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QUALIFICATION RULING

In the matter of George Mason University
Ruling Number 2020-5023
January 24, 2020

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR")[1] at the Virginia Department of Human Resource Management ("DHRM") on whether his October 8, 2019 grievance with George Mason University (the "University" or "agency") qualifies for a hearing. For the reasons discussed below, this grievance is qualified for a hearing.

FACTS

The grievant is a Lieutenant with the University's police department. On or about September 12, 2019, the agency issued to the grievant a counseling memo. The counseling memo related to the grievant's conduct in August 2019 in the handling and sharing of body camera video from a January 2019 occurrence of alleged police misconduct. The grievant states that on August 12, 2019, he attempted to address the matter of alleged police misconduct with his superior. The grievant's superior reported the matter up the chain of command, and an internal review took place. The grievant also states he reported the matter to the Office of the State Inspector General (OSIG) and the University's human resources office on August 16. At the request of human resources, the grievant shared a copy of the video with that office on August 20. The Chief determined that it was a violation of policy for the grievant to share the video with human resources and issued the September 12, 2019 counseling memo.

As a result of the counseling memo, the grievant was removed from his duties involving evidence and video. The grievant also had his access to body camera video revoked. According to the grievant, his new assignment has less flexibility in hours, involves patrol duties, and requires him to be in uniform, rather than plain clothes as in his prior assignment.[2] The grievant asserts that the counseling memo is in retaliation for reporting an issue of alleged police misconduct, for filing a grievance in December 2018, and for contacting OSIG. He seeks, among other things, removal

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.

[2] The grievant was also apparently not invited to attend command staff meetings after the issuance of the counseling memo, but that prohibition, to the extent it was a prohibition, has ended.

of the counseling memo and return to his previous position. After the grievance proceeded through the management steps, the agency head denied further requested relief[3] and declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[4] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[5] Thus, claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[6]

For state employees subject to the Virginia Personnel Act, appointment, promotion, transfer, layoff, removal, discipline, and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the policies and procedures promulgated by DHRM.[7] For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.[8] These safeguards are in place to ensure that disciplinary actions are appropriate and warranted.

Where an agency has taken informal disciplinary action against an employee, a hearing cannot be avoided for the sole reason that a Written Notice did not accompany the disciplinary action. Rather, even in the absence of a Written Notice, a hearing is required where the grieved management action resulted in an adverse employment action[9] against the grievant and the primary intent of the management action was disciplinary (i.e., taken primarily to correct or punish perceived poor performance).[10]

An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in

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[3] The third step-respondent removed and replaced the content of the counseling memo. However, the third step-respondent upheld the grievant's violation of police department policy in his handling of the video as well as the grievant's change in assignment.
[4] *See Grievance Procedure Manual* § 4.1.
[5] Va. Code § 2.2-3004(B).
[6] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[7] Va. Code §§ 2.2-2900-2905.
[8] DHRM Policy 1.60, *Standards of Conduct*.
[9] The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions." *See Grievance Procedure Manual* § 4.1(b); *see also* Va. Code § 2.2-3004(A).
[10] *See, e.g.*, EDR Ruling Nos. 2007-1516, 2007-1517; EDR Ruling Nos. 2002-227, 2002-230; *see also* Va. Code § 2.2-3004(A) (indicating that grievances involving "transfers and assignments … resulting from formal discipline or unsatisfactory job performance" can qualify for hearing).

benefits."[11] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[12]

A counseling memo does not generally constitute an adverse employment action because the counseling memo, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[13] However, the counseling memo issued in this situation resulted in a reassignment. A transfer or reassignment to a different position may constitute an adverse employment action if a grievant can show that there was some significant detrimental effect on the terms, conditions, or benefits of his/her employment.[14] For example, a reassignment or transfer with significantly different responsibilities, or one providing reduced opportunities for promotion, may, depending on all the facts and circumstances, be considered an adverse employment action.[15] However, in general, a lateral transfer will not rise to the level of an adverse employment action.[16] Subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.[17]

In this case, the question of whether the grievant has experienced an adverse employment action is a close one. On the one hand, the grievant maintained his rank, salary, and work location. On the other hand, he was reassigned to markedly different duties, purportedly had the flexibility of his schedule constrained, and had his access to body camera video revoked. Given the surrounding circumstances, it is difficult to describe the directives as non-punitive.[18] As such, for purposes of qualification for a hearing, the grievance raises a sufficient question as to whether the grievant experienced an adverse employment action.

This grievance also raises a sufficient question as to whether the agency's primary intent was to correct or punish perceived unsatisfactory job performance or conduct. As such, this grievance raises issues that qualify for hearing under the grievance procedure. Qualification of the grievance for hearing includes the grievant's claims of retaliation. While the agency will have the burden of proving that the reassignment described in the counseling memo was warranted and appropriate, the grievant will have the burden to prove that the University's actions were the result of retaliation. Should the hearing officer find that the reassignment was retaliatory, unwarranted, and/or inappropriate, he or she may rescind it, as warranted by the applicable record evidence, just as he or she may rescind any formal disciplinary action.[19] This qualification ruling in no way determines that the grievant's reassignment constituted unwarranted informal discipline or was otherwise improper, but only that further exploration of the facts by a hearing officer is warranted.

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[11] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[12] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[13] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).
[14] *See Holland*, 487 F.3d at 219 (citation omitted).
[15] *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 375-77 (4th Cir. 2004); Boone v. Goldin, 178 F.3d 253, 255-256 (4th Cir. 1999); *see also* Edmonson v. Potter, 118 Fed. Appx. 726, 729 (4th Cir. 2004).
[16] *See* Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996); *e.g.*, Sercer v. Holder, 104 F. Supp. 3d 746, 751 (E.D. Va. 2015).
[17] *See, e.g.*, Jones v. D.C. Dep't of Corr., 429 F.3d 276, 284 (D.C. Cir. 2005); *James*, 368 F.3d at 377.
[18] The grievance record reflects that the Chief described the actions taken against the grievant as "discipline."
[19] *See, e.g.*, EDR Ruling No. 2002-127.

The grievant's October 8, 2019 grievance is qualified for hearing as to the issues described above. The University is directed to request the appointment of a hearing officer by submitting a fully completed Form B within five workdays of the date of this ruling.

EDR's qualification rulings are final and nonappealable.[20]

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[20] *See* Va. Code § 2.2-1202.1(5).